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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY,

Appellant,

vs.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

Appellees.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

BRIEF FOR STATE OF NEW JERSEY AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS	1
ARGUMENT—The freedom of the press guaranteed by the First Amendment is not transgressed by a state proscription on the publication of sex-segregated classified employment advertising columns by newspapers	4
CONCLUSION	8

Cases Cited

Breard v. City of Alexandria, 341 U. S. 622 (1951)	5, 6
Ginzburg v. United States, 383 U. S. 463 (1966)	5, 6
Grosjean v. American Press Co., 297 U. S. 233 (1936)	5
Lorain Journal Co. v. United States, 342 U. S. 143 (1951)	4, 6
Mabee v. White Plains Pub. Co., 327 U. S. 178 (1946)	4
Near v. Minnesota, 283 U. S. 697 (1930)	5
New York State Broadcasters Ass'n., Inc. v. United States, 414 F. 2d 990 (2nd Cir. 1969), cert. denied 396 U. S. 1061 (1970)	5
New York Times Co. v. Sullivan, 376 U. S. 254 (1964)	5
Oklahoma Press Pub. Co. v. Walling, 327 U. S. 186 (1946)	4
The Associated Press v. N.L.R.B., 301 U. S. 103 (1937)	5, 7
Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969)	6

PAGE

United States v. Hunter, 459 F. 2d 205 (4th Cir.), cert. denied —— U. S. ——, 93 S. Ct. 235, 34 L. Ed. 2d 189 (1972) 5

Valentine v. Chrestensen, 316 U. S. 52 (1942) 5

United States Constitution Cited

First Amendment 4,7

Statutes Cited

N.J.S.A. 10:5-12(c) 2

N.J.S.A. 10:5-12(e) 2

Rules Cited

N. J. Adminis. Code:

Sec. 13:11-1 2

New Jersey Employment Advertising Rule 1

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Interest of the *Amicus*

The New Jersey Division on Civil Rights has adopted an Employment Advertising Rule prohibiting the maintenance of classified employment advertising columns seg-

regated on the basis of race, creed, color, sex, national origin, ancestry, marital status or age or the expression in the body of employment advertisements of such unlawful discriminatory preferences.

In April 1972, the New Jersey Division on Civil Rights conducted two days of public hearings on the proposed Rule. A representative of a major cooperating daily newspaper which was already operating with a single-column format testified that the proposed Rule was practicable, far more fair to readers than the segregated format and not economically detrimental to the newspaper. Representatives of private employment agencies also strongly supported adoption of the Rule. Numerous persons appeared on behalf of various women's organizations and detailed the severe discrimination in employment faced by women in New Jersey and the role of segregated advertising columns in fostering such discrimination. One witness stated that there are over 260,000 female heads of households in the State and that many of these women are not aggressive and therefore would not apply for jobs labeled "male" or "male interest," even though they may be fully qualified for the positions. She observed that the custom of segregating classified advertising columns had its genesis in an era when the public was insensitive to social injustice and when it was equally customary to segregate such columns on the basis of race.

The Division on Civil Rights adopted the proposed Rule on April 14, 1972. *See* N. J. Adminis. Code §13:11-1 *et seq.* The Rule, based on legislation substantially similar to sections 8(e) and (j) of Pittsburgh's Human Relations Ordinance (N.J.S.A. 10:5-12(c) and (e)), provides that it shall be unlawful for employers, employment agencies, unions and newspapers to publish or cause to be published classi-

fied employment advertisements under column headings segregated on the basis of sex, marital status, race, creed, color, national origin, ancestry or age. It also prohibits the expression in the body of any employment advertisements of any preference or limitation based on any of these criteria, unless such a restriction is grounded on a "bona fide occupational qualification." The Rule elucidates the latter phrase at some length, stating in part that it shall be interpreted "so that individuals will be considered for employment on the basis of their individual capacities and not on the basis of any characteristics generally attributable to their group." If an advertiser or newspaper is in doubt as to whether a particular generic characteristic is a bona fide qualification for a job, it may contact any of the offices of the Division on Civil Rights for guidance. The Rule requires the Division to respond promptly and to maintain records of all such advice rendered. A newspaper may in its discretion require all advertisers wishing to express any generic preferences to contact the Division, rather than do so itself. Any advertiser or newspaper relying on such agency device, or any newspaper reasonably relying on an advertiser's representation that it has obtained the Division's opinion that there is a bona fide occupational qualification for a particular job, is granted immunity from any charge of unlawful discrimination based thereon.

Two newspapers filed an appeal from the adoption of the Rule in the Superior Court of New Jersey, Appellate Division, which granted a stay thereof pending completion of the appeal. Prior to oral argument, and before this Court granted certiorari in the instant case, the Supreme Court of New Jersey granted certification of the appeal. The matter will shortly be argued in the latter court.

Although a due process issue has been raised by the appellants in the instant appeal premised on the alleged improper use of a conclusive presumption in the quasi-judicial proceeding below, this issue will not be addressed by the State of New Jersey because it appears to have no bearing on the validity of the New Jersey Employment Advertising Rule, which was adopted by exercise of the administrative agency's quasi-legislative powers. However, the First Amendment issue as raised is relevant to the validity of the New Jersey Rule and therefore the State desires to express its views on that issue as *amicus curiae*.

ARGUMENT

The freedom of the press guaranteed by the First Amendment is not transgressed by a state proscription on the publication of sex-segregated classified employment advertising columns by newspapers.

The Court has long and consistently recognized that while the First Amendment protects the editorial freedom of the press, to the extent that "the press has business aspects it has no special immunity from laws applicable to business in general." *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184 (1946). *Accord, Lorain Journal Co.* v. *United States*, 342 U. S. 143, 155-56 (1951); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 192-93 (1946). As long ago as 1937 the Court observed:

> "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and

liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and non-discriminatory taxes on his business. The regulation here in question has no relation whatever to the impartial distribution of news." *The Associated Press* v. *N.L.R.B.*, 301 U. S. 103, 132-33 (1937).

The Court has also specifically held that while the First Amendment protects "freedom of communicating information and disseminating opinion," it "imposes no such restraint on government as respects purely commercial advertising." *Valentine* v. *Chrestensen*, 316 U. S. 52, 54 (1942). *Accord, Ginzburg* v. *United States*, 383 U. S. 463, 474 n. 17 (1966); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 265-66 (1964); *Breard* v. *City of Alexandria*, 341 U. S. 622, 641-45 (1951); *United States* v. *Hunter*, 459 F. 2d 205, 211-12 (4th Cir.), *cert. denied* —— U. S. ——, 93 S. Ct. 235, 34 L. Ed. 2d 189 (1972); *New York State Broadcasters Ass'n., Inc.* v. *United States*, 414 F. 2d 990, 998-99 (2nd Cir. 1969), *cert. denied* 396 U. S. 1061 (1970). Indeed, commercial advertising is so subject to the exercise of governmental police power that in *Lorain Journal Co.* v. *United States, supra*, the Court affirmed the granting of an injunction against a newspaper's refusal to accept advertisements from companies which placed ads with a competing radio station. Such a remedy would be forbidden in all but the most extraordinary circumstances where protected types of speech are involved. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-49 (1936); *Near* v. *Minnesota*, 283 U. S. 697, 715-16 (1930).

No reason appears why these general principles should not govern the instant case as well. It must be emphasized that prohibiting a newspaper from publishing sex-

segregated employment advertising columns does not in the least mute or interfere with its formulation or expression of editorial policy or its dissemination of news. Any newspaper subject to such a regulation remains entirely free in its editorial or news columns to criticize vigorously the government's position and affirmatively to advocate that sex-segregated employment advertising columns are socially desirable. Nor can it reasonably be argued that the very act of publishing a sex-segregated advertising format itself expresses any editorial views. While the Court has held that appropriate types of symbolic speech enjoy constitutional protection (*e.g., Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969)), the use of a particular advertising format simply cannot reasonably be regarded as "speech." Every conscious action is preceded by a thought process culminating in a decision, but this consideration hardly raises every action to the dignity of protected speech. If it did, then presumably a purveyor of pornography could successfully maintain that his actions are immune from regulation because they symbolically convey his idea that pornography is beneficial to people (*cf. Ginzburg* v. *United States, supra*), an obstrusive door-to-door salesman that his sales techniques communicate his belief that his tactics serve the convenience of his potential customers (*cf. Breard* v. *City of Alexandria, supra*), a violator of the antitrust laws that monopoly is an economically desirable goal or that the antitrust laws are unjust (*cf. Lorain Journal Co.* v. *United States, supra*), or, for that matter, a terrorist hijacker that violent revolution is the best way to bring about desirable social change.

It is equally wide of the mark to assert that the state is attempting to make newspapers the unwilling agents of social change. Rather, the state is seeking merely to

prevent newspapers from using their commercial advertising columns to foster and perpetuate unlawful discrimination. Neither is it appropriate to urge that upholding the regulation involved in this appeal would open the door to broad governmental incursions on those activities which are protected by the First Amendment. The First Amendment will be secure so long as there is a judiciary with the power to act and the capacity to discern genuine threats to protected freedoms from legitimate regulations of non-protected activities. As the Court stated in a related context:

> "[Petitioner] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *The Associated Press* v. *N.L.R.B., supra,* 301 U. S. at 132.

In summary, it is difficult to imagine any type of advertising more mundane or "purely commercial" than classified employment advertising. It is equally difficult to conceive of a more modest regulation thereof than a requirement which does not ban any advertising or, in the present case, even affect its content, but merely regulates one aspect of format. It is submitted that such regulations do not violate the guarantees of the First Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Commonwealth Court of Pennsylvania should be affirmed.

Respectfully submitted,

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